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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 300.

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,

Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,

Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

BRIEF FOR APPELLANTS.

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Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

BRIEF FOR APPELLANTS.*

I.

OPINIONS BELOW.

The opinion rendered with respect to the decree herein appealed from, is not reported, but was printed as "Appendix A" to the Jurisdictional Statement. The decree

* Due to the expedited nature of this case, this brief is being prepared prior to printing of the record, and hence citation to pages of the record is impossible.

itself was printed as "Appendix B" thereto. The decision of the three-judge district court at an earlier stage of this litigation, involving reapportionment of the State Senate, is reported as **Toombs v. Fortson**, 205 F. Supp. 248 (D. C. Ga. 1962).

II.

JURISDICTION.

The order of the three-judge district court, as finally revised, was entered on June 30, 1964. Notice of Appeal was filed on July 1, 1964, and probable jurisdiction was noted October 8, 1964. Jurisdiction is based on 28 U. S. C. 1253.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Georgia Constitutional and statutory provisions declared unconstitutional below are as follows:

(a) Constitution of Georgia of 1945, Art. III, Sec. III, Par. I (Code, § 2-1501).

(b) Georgia Code, § 47-101, as amended.

Copies of these provisions are attached hereto as "Appendix A."

Provisions of the Georgia Constitutions of 1877 and 1945 governing amendment and revision of the Constitution, also drawn in question in this case, are attached hereto as "Appendix B."

IV.

QUESTIONS PRESENTED.

1. Whether a federal district court in a reapportionment case involving one house of a state legislature, the other house already being on a population basis, has authority to grant relief not only requiring reapportionment of the house found to be defective, but also enjoining, until reapportionment has been completed, submission to the voters for ratification or rejection of a proposed constitution approved by a two-thirds vote of the State legislature?

2. Whether in such a case a federal court also is empowered to grant relief purporting to limit the matters which the legislature may consider pending reapportionment, and to further limit the House of Representatives from functioning except during the regular 45-day session?

3. In enjoining submission to the voters of the new state constitution pending reapportionment, the district court relied in part upon federal grounds involving malapportionment, and in part upon the court's interpretation as to the power of the General Assembly under the State constitution. The question therefore is whether under such circumstances the district court erred in refusing to abstain, and in proceeding to make an independent interpretation of the State constitution, contrary to a previous interpretation by the State's highest court.

V.

STATEMENT OF THE CASE.

On April 4, 1962, four citizens of Georgia, residents of the State's two most populous counties, Fulton and DeKalb, filed complaint against the Secretary of State of Georgia and the ordinaries of six counties in Georgia, the latter being sued as representatives of all ordinaries, attacking the validity under the Fourteenth Amendment of constitutional and statutory provisions governing apportionment of the House of Representatives and State Senate of the Georgia General Assembly.

The apportionment of the House of Representatives, then and now, is prescribed by the State Constitution,[1] which provides that the eight largest counties shall have three representatives each; the thirty counties having the next largest populations, two representatives each; and the remaining 121 counties, one representative each.[2] The Constitution requires that this apportionment be changed within the limits of the prescribed formular following each census,[3] and unlike the situation in **Baker v. Carr**, 369 U. S. 186 (1962), this requirement had always been followed.[4] This 3-2-1 formular of House apportionment had originated in the Constitution of 1868,[5] and was carried forward in the Constitutions of 1877[6] and 1945.

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[1] Art. III, Sec. III, Pars. I and II (Code Ann., §§ 2-1501, 2-1502).

[2] Georgia has a total of 159 counties. See Constitution, Art. XI, Sec. I, Par. II (Code Ann., § 2-7802); Code Ann., § 23-101.

[3] Art. III, Sec. III, Par. II (Code Ann., § 2-1502).

[4] See, e. g., Ga. Laws 1941, p. 348; Ga. Laws 1951, p. 26; Ga. Laws 1961, p. 111.

[5] McElreath, A Treatise on the Constitution of Georgia, § 703 (1912); hereinafter cited as "McElreath".

[6] McElreath, § 864.

With respect to the Senate, at the time of filing of the complaint in 1962, the Constitution merely provided that there should be not more than fifty-four senatorial districts with one senator from each district,[7] and the actual apportionment was defined by statute,[8] which arranged the counties in districts of three counties each with but two exceptions: Fulton, the State's largest county, constituted one district, and Chatham, the second largest county at the time of passage of the then current apportionment statute, was combined with Effingham to constitute a two-county district. This apportionment of the State Senate on a basis of three-county groupings originated with the Constitution of 1861,[9] and was carried forward substantially in all subsequent constitutions.[10] The representation in both Houses of the General Assembly was therefore primarily predicated on a political unit basis with some recognition given to population in the House,[11] and to a lesser extent in the Senate.

Also in effect for a number of years were statutes prescribing a "rotation plan" for senators, whereby the nomination of candidates would be rotated among the counties in each district, so that in all districts, other than Fulton, nomination of the senator be rotated among the counties comprising the district each term.[12]

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[7] Constitution of 1945, Art. III, Sec. II, Par. I (Code Ann., § 2-1401).

[8] Code Ann., § 47-102.

[9] McElreath, § 475.

[10] McElreath, §§ 576, 699; 862a.

[11] A more complete history of the apportionment of legislative power in Georgia is set forth in the opinion of the District Court in the county-unit case, *Sanders v. Gray*, 203 F. Supp. 158 (D. C. Ga. 1962).

[12] Ga. Laws 1946, p. 42, as amended; Ga. Laws 1950, p. 165; Ga. Laws 1939, p. 311.

Following filing of the complaint, a three-judge court was convened, and after hearing, rendered its decision on May 25, 1962, declaring that ". . . [W]e determine and hold that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements." With respect to relief, the Court declared, "We have concluded that we should postpone any further proceedings in this matter until the State has had a reasonable opportunity to meet the constitutional standards here laid down prior to the January, 1963, session." **Toombs v. Fortson,** 205 F. Supp. 248, 257, 259 (D. C. Ga. 1962).

Several subsequent clarifying opinions were rendered, but none of them had the effect of changing the Court's original order. However, pertinent to one of the arguments presented here, in a clarifying order of July 13, 1962, a majority of the Court concluded:

> "Neither did we hold that the General Assembly would not have legal status or existence if the apportionment standard set by us is not met by the January, 1963, deadline. We have not reached that point. It would be a drastic intrusion into the affairs of the State—the most drastic of the remedies available to the Court. Its present status will continue until changed."

Judge Tuttle, on the other hand, dissented on this point, declaring that "unless the constitutional defects are remedied by the time the new Legislature takes office in January, Georgia will have no legally constituted Legislature".

In another clarifying order rendered September 5, 1962, a majority of the Court, in reviewing several proposals then under consideration by a state legislative committee,

held that so long as one house of the State Legislature was apportioned according to population, the other house might be based upon geography or other considerations, "so long as [its] composition . . . is not so unrepresentative as to cause the entire Legislature to depart from the pattern set by the United States Congress".

Under the Constitution and laws of Georgia, members of the House and Senate were to be elected for two-year terms in the 1962 November General Election, and notwithstanding that the General Assembly had just completed one extraordinary session in April, an unprecedented second extraordinary session was called by the Governor which convened on September 27, 1962, to consider measures reapportioning one house in accordance with the Court's opinion.[13]

The General Assembly convened in extraordinary session as scheduled and enacted legislation and proposed a constitutional amendment, providing for reapportionment of the State Senate on the basis of 54 single member senatorial districts comprising substantially equal numbers of people (Ga. Laws 1962, 2nd Ex. Sess., pp. 7, 51).[14] The constitutional amendment was ratified by the people in the 1962 November General Election, and also at said election, senators were elected in accordance with the new reapportionment legislation to take office in January, 1963. Litigation involving the validity of so much of this legislation as required county-wide voting for senators in multi-district counties is now before this court in an appeal entitled **Fortson v. Dorsey**, No. 178, October Term 1964.[15] Other than

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[13] Ga. Laws 1962, 2nd Ex. Sess., p. 3.

[14] As pointed out in the brief for the United States in *Gray v. Sanders*, 372 U. S. 368 (1963), under the 1963 Senate Apportionment Act, the nine most populous counties having 43% of the State's population elect 43% of the Senators.

[15] For the decisions below, see *Dorsey v. Fortson*, 228 F. Supp. 259 (D. C. Ga. 1964).

as involved in the case last mentioned, the validity of the 1962 reapportionment legislation is not in question, the court below as well as plaintiffs herein having recognized that said legislation effectuated a valid reapportionment of the Georgia Senate on a population basis in accordance with federal constitutional standards. The State of Georgia thereby fulfilled its constitutional responsibility within the same year of the court's decision, without the necessity of a single injunctive order having been issued.

On June 17, 1964, two days after rendition of this Court's decision in **Reynolds v. Sims**, 377 U. S. 533 (1964), plaintiffs below filed motion for further relief, seeking to compel reapportionment of the House of Representatives of the General Assembly of Georgia.

At the hearing on this motion, held on June 19, 1964, counsel for plaintiffs stated at the outset that there were but two questions before the Court, viz:

> "That then leaves us only two questions: Who should do the job? and when?"[16]

The first intimation that issues other than those asserted by plaintiffs might be at stake came from an observation by Chief Judge Tuttle, who expressed concern that during any interim period pending reapportionment, the State was "continuing to legislate on some of the most basic problems of our State, including the passage . . . of a new election law . . . and also . . . the consideration of a new constitution . . ." (Tr. 17). On several other instances during argument, Judge Tuttle raised this same issue again (Tr. 43; 72; 92; 94), but was reassured by counsel for plaintiffs that such relief was "beyond the scope of our petition . . ." (Tr. 43; 94).

When counsel for defendants sought to respond to this proposition, he was stopped by another of the Judges, who declared:

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[16] Tr. 20.

"Judge Bell: Mr. Leverett, the best answer you have to Judge Morgan and Judge Tuttle, it seems to me, is Mr. Shackleford just stated in open court this was beyond the scope of his petition . . ." (Tr. 65).

However, another aspect of the order which finally emerged was injected by Judge Bell himself, who raised the possibility that the Court might grant a delay, but enjoin the 1965 Legislature from taking any action at the 1965 Session other than reapportioning the House (Tr. 69).

Following these arguments on June 19, the Court rendered an opinion and proposed order.

In its opinion, the Court declared that, "It is thus plain to all that the present Legislature is constituted in such a manner as to violate the Constitutional rights of the plaintiffs and the class which they represent."

With respect to relief, the Court noted that the General Assembly was at that time convened in special session considering the enactment of an election code, and the proposing of a new state constitution.[17]

With respect to the election code, the court observed that it could be changed by a subsequently reapportioned legislature merely by majority vote. With respect to the proposed constitution, however, the Court noted that it could be amended later only by a two-thirds vote of both houses, and ratification by the people. Also in this con-

[17] This extraordinary session had been called by the Governor, primarily for the purpose of considering a new state constitution, without regard to any considerations of apportionment, but simply in response to widespread demand from all areas of the state, predicated upon the statutory detail of the 1945 Constitution which had made necessary over 380 amendments within less than 20 years. Constitutional revision had been one program announced by Governor Sanders in his state-of-the-state address following his inauguration in 1963. Consideration of the election code *at this same session* was merely an afterthought, suggested by the fact that while one house was considering the Constitution, the other house could be devoting its time to the election code.

nection, the Court expressed doubt as to the validity of the pending constitutional revision procedure under the state constitution. In this respect, the Court had reference to a contention currently being made in the public press to the effect that because the Georgia Constitution made provision for specific, individual amendments by two-thirds vote of both houses and ratification by the people,[18] whereas in another provision dealing with conventions of the people, reference is made to "revising the Constitution,"[19] the necessary inference is that the preparation of an **entirely new constitution** can be submitted only by a convention, which admittedly had not been the case as to the pending Constitution.[20]

On the basis of these considerations—federal law considerations as to malapportionment, and state law considerations as to the legality of the proposed procedure—the court concluded:

> "Thus, while we feel it appropriate in the exercise of the judicial function to permit the General As-

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[18] Constitution of Georgia, Art. XIII, Sec. I, Par. I.

[19] Id., Par. II.

[20] The proposed new Constitution was originally drafted by a "Constitution Revision Commission" created by law, the members of which were appointed by the Governor. See Ga. Laws 1963, p. 402. This draft was then submitted to the General Assembly where it received a vote of two-thirds of the members of both houses, including the population-based senate. The proposal was then to have been submitted to the people for ratification or rejection in the November 1964 general election. The identical procedure was employed in connection with the adoption of the 1945 Constitution under the 1877 Constitution which was for all purposes here identical to the 1945 Constitution as regards amendment procedures. See "Appendix B." In *Wheeler v. Trustees of Fargo School District*, 200 Ga. 323, 37 S. E. 322 (1946), the Supreme Court of Georgia upheld the submission procedures utilized with respect to the 1945 Constitution and now being invoked with respect to the pending constitution, on the reasoning that the provision of the Constitution relating to conventions was not exclusive, but a limitation only if the convention procedure were followed.

sembly to reapportion itself, since the guidelines now established by the Supreme Court are plain and simple, we do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body".

The Court then set forth a proposed order which, in addition to declaring unconstitutional the state constitutional and statutory provisions governing apportionment of the House of Representatives, also would (1) Enjoin submission of the proposed new state Constitution, and (2) Limit the authority of the 1965 General Assembly, pending reapportionment, (a) to specified "legislation", and (b) to functioning during the regular 45-day session.

Appellants filed response in opposition to this proposed order, but after hearing, the Court issued the order in substantially the same form as previously indicated, on June 24, 1964. The order was later revised on July 30.

Application for stay was denied below, and by Mr. Justice Black of this Court on July 6, 1964.

The effect has been that the proposed state constitution, the principal product of a special session costing in excess of one million dollars, will not be submitted to the voters in the 1964 General Election.

Also pertinent to the proceedings here, on October 7, 1964, appellants here filed "Motion for Modification of Order" with the District Court below, seeking modification of the district court's order here appealed from, so as (1) To permit the General Assembly elected in 1964 to serve a full, two-year term, rather than requiring reapportionment in the middle of the term, and (2) On the alternative, to

modify the order so as to remove the limitations placed upon the 1965 General Assembly as to the time during 1965 in which it may function, and the subject matters which it may consider. Assuming that the district court may properly entertain this motion,[21] at the time this brief is written, no hearing has been set upon the motion.

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[21] For a holding to the contrary, see *Schempp v. School District of Abington Township*, 184 F. Supp. 381 (D. C. Pa. 1959). In the present case, however, the district court expressly retained jurisdiction "for such other and further orders as may be necessary".

VI.

ARGUMENT.

1. The District Court Erred in Enjoining Submission of the Proposed State Constitution.

The issue here concerns the appropriateness of relief beyond the compelling of reapportionment itself. Essentially, the question is whether a federal court, having decreed reapportionment of one house of a state legislature, the other house being already on a population basis, acts properly and within its authority in seeking to delimit the law-making process during the interim period pending reapportionment. Moreover, since the order in question here relied not only upon federal considerations of malapportionment in enjoining submission of the state constitution, but also predicated its decision in part upon an independent interpretation of the Legislature's power under the existing state constitution, the collateral question is also presented as to whether the federal court erred in declining to abstain pending determination of the state law question by the state courts.

Before considering these questions, however, it is necessary that the issue of mootness be dealt with.

By the time this case is argued on November 18, the 1964 General Election will have passed, and, of course, the proposed state constitution[1] will not have been voted upon. Under the existing state constitution,[2] as well as under the submitting clause of the proposed constitution,[3] the proposed constitution as submitted by the 1964 General Assembly could have been voted on only in the 1964 General Election. However, the order complained of purports to

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[1] Ga. Laws 1964 Ex. Sess., p. 234.

[2] Art. XIII, Sec. I, Par. I (Code Ann., § 2-8101).

[3] Ga. Laws 1964 Ex. Sess., pp. 234, 333.

enjoin its submission not only at the 1964 election, but also "at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards . . ." Since constitutional revision is one of the Governor's major programs, it is quite likely that he may wish to present the proposed revision to the 1965 General Assembly for resubmission to the voters at the 1966 General Election. Nor is it any answer to say that this presentation could be made to the 1966 General Assembly, which presumably under the court's order below will have been reapportioned by that time, for there are other, unrelated reasons why presentation to the 1966 General Assembly is not desirable. In this respect, reference is made to the fact that 1966 is a "political year" in Georgia, in that not only will a new legislature be elected, but also a governor and a vast majority of all other state officers. Under such circumstances, a Legislature is not capable of promulgating any meaningful constitutional reform. Consequently, it is quite apparent that the issue as to the proposed constitution is not moot. cf. **Gray v. Sanders**, 372 U. S. 368, 375 (1963); **Leonard v. Earle**, 279 U. S. 392, 398 (1929); **J. I. Case Co. v. N. L. R. B.**, 321 U. S. 332, 334 (1944).

(a) **Enjoining Submission of the State Constitution on Federal Grounds.**

In addition to the considerations of state law, hereinafter referred to, the Court predicated this feature of its order on the reasoning that the ill-effects of a malapportioned legislature would be frozen into the Constitution which would, because of the two-thirds vote of both houses required by the Constitution, be difficult to eliminate in the future. But if this be the case, are not the people themselves just as capable of reaching this same conclusion and resolving the issue at the ballot box in November by the very means which the Court below has denied them? Have democratic processes become

so destitute in this country that people can no longer be trusted with important policy decisions, but must have them resolved by the judicial bench? The simple fact of the matter is that policies should be set by legislative bodies, albeit malapportioned ones, for of all institutions, courts are the least representative. See **Carpenter**, 9 Vill. L. R. 415, 420 (1964). And, as recently stated, "In the long run, judge-made policy may well prove to be the more arbitrary, less-generous, and more chilling than what emerges from the political market place." **Lancaster**, 15 Vand. L. R. 1247, 1248-9 (1962).

Aside from this, the Court resolved this issue on an assumption that was neither plead at the outset, supported by evidence, nor supplied by judicial notice. There was nothing whatever before the Court which would justify a finding that the proposed Constitution had been "loaded" by a rural-dominated legislature in such a manner as to induce acceptance of undesirable features in order to gain desirable ones. A finding which is not based on evidence denies due processes. **Thompson v. City of Louisville**, 362 U. S. 199 (1960). Nor can judicial notice be taken of matters not called to the attention of the parties, for to do so would be "to turn the doctrine into a pretext of dispensing with a trial." **Garner v. Louisiana**, 368 U. S. 157 (1961).

But beyond these considerations, the more basic question here is the power of the federal court, in effect, to assume a trusteeship over the internal workings of state government, hardly less drastic in nature than placing the state in a receivership.

At the outset, it is undisputed that legislation enacted by a malapportioned legislature is valid notwithstanding such unconstitutional apportionment, **Cedar Rapids v. Cox**, 252 Iowa 948, 964, 108 N. W. 2d 253, 262 (1961); **State v. Latham**, 190 Kan. 411, 375 P. 2d 788, 799 (1962);

Ryan v. Tinsley, 316 F. 2d 430 (C. A. 10th 1963), cert. den. 375 U. S. 17 (1963); **United States ex rel. Watkins v. Pennsylvania**, 214 F. Supp. 913 (D. C. Pa. 1963); **Barnes v. Ladner**, 241 Miss. 606, 131 So. 2d 458 (1961); **People v. Clardy**, 334 Ill. 160, 165 N. E. 638 (1929); **Dixie Fireworks Co., Inc. v. McArthur**, 218 Ga. 735, 130 S. E. 2d 731 (1963); **Scholle v. Hare**, 367 Mich. 176, 116 N. W. 2d 350, 356 (1962); **Opinion to the Governor**, 185 A. 2d 111 (1962); **Lindsay v. State**, 41 Ala. App. 496, 139 So. 2d 353 (1962); **Baker v. Carr**, 206 F. Supp. 341, 350 (D. C. Tenn. 1962); and see Katzenbach, "Some Reflections Upon Baker v. Carr", 15 Vand. L. R. 829, 835 (1962), where it was said: "In each case, the remedy is directed at future elections and does not impeach the validity or ability to act, of the incumbent legislature."

In his concurring opinion in **Baker v. Carr**, Mr. Justice Douglas noted: "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act (**Cedar Rapids v. Cox**, 252 Iowa 948, 964, 108 N. W. 2d 253, 262, 263; cf. **Kidd v. McCanless**, 200 Tenn. 273, 292 S. W. 2d 40) is plainly correct."

Therefore, if legislation enacted by a malapportioned legislature is not thereby rendered invalid, upon what basis can the law be invalidated even before passage? In the present context, the case is an even stronger one, because of the rule that in no event do courts intervene, regardless of the supposed invalidity of the pending law, until the enactment is complete.

In **Gaskins v. Dorsey**, 150 Ga. 638, 104 S. E. 433 (1920), it was said:

> "The judicial power will not be exerted to stay the course of legislation while it is in process of enactment; and this principle is applicable both to

ordinary legislation and to the analogous course of an amendment to the constitution from the time of the introduction of the act proposing the amendment until the electors have acted."

See also, in accord, **Clayton v. Calhoun**, 76 Ga. 270 (1885); **Clements v. Roberts**, 230 S. W. 30, 144 Tenn. 129, reh. den. 231 S. W. 902; 144 Tenn. 152; **11 Am. Jur. 902**, Sec. 200; **16 C. J. S. 724**, Sec. 151 (1). The only exception is when the election itself would be illegal, in which case a taxpayer has standing to challenge the expenditure of public funds for holding an illegal election. See **Tolbert v. Long**, 134 Ga. 292, 67 S. E. 826 (1910), distinguished in the Gaskins case, supra.

As stated by this Court, "Litigation cannot arise until the moment of legislation is past." **Prentis v. Atlantic Coast Line Co.**, 211 U. S. 210, 228 (1908). The Court's function is "the more limited one of interpreting the law as it now stands," **Sinclair Refining Co. v. Atkinson**, 370 U. S. 195, 215 (1962), and "The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance." **McChord v. L. & N. Railroad Co.**, 183 U. S. 483, 496 (1902), and see **Drew v. Scranton**, 229 F. Supp. 308 (D. C. Pa. 1963).

In answer to these principles, the novel argument is presented by plaintiffs to the effect that because the court below concededly could have ordered reapportionment of the House prior to the 1964 elections, by declining to do so and granting a delay, the court in some unexplainable fashion acquired powers otherwise lacking, an order to provide "accommodation" by prescribing the "performance of conditions designed to protect the rights of the parties pending appeal . . . or to protect temporarily the public interest while its decree is being carried into effect" (Motion to Affirm, p. 8). The first difficulty with this proposition is that it generally is applied only to a **plaintiff**

seeking relief on the reasoning that "he who seeks equity must do equity", **Central Kentucky Natural Gas Co. v. Railroad Commission**, 290 U. S. 264, 271 (1933), is a power which "should be cautiously exercised" (Id., 290 U. S. at 272) and is subject to limitations "inherent in the nature of the jurisdiction" exercised by the court, which may not usurp the legislative function itself (290 U. S. at 271). It is significant to note that the **Kentucky Natural Gas Company case**, supra, relied upon by plaintiff, involved a holding by this court that a requirement imposed by the district court as a condition of the grant of relief prayed by plaintiff, was invalid as an attempt by the court to invade the province of the state legislative body in the prescribing of utility rates. It was said:

> "The practical effect of a denial of relief unless the plaintiff will submit to a rate, the reasonableness of which he challenges, is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts. The practice would tend to curtail the exercise of that function by action of a court which is itself without authority either to exercise it or to prevent the state from doing so. Such interference with the legislative function is not a proper exercise of the discretionary powers of a federal court of equity."

Moreover, if the doctrine asserted here is to be applied prospectively, what is to prevent it from being manipulated so as to achieve a retroactive effect? For example, could the court here have conditioned the delay in reapportionment upon the interim legislature's complying with a court-directed mandate to repeal all existing legislation deemed by the court to reflect built-in-biases of the existing system found to be malapportioned? More concretely, the issue is drawn into sharp focus here because of the fact that the existing 1945 Constitution was submitted by a legislature which overall was much more

malapportioned than the legislature which submitted the pending document. The 1964 Senate had been reapportioned on a population basis, under which residents of the nine most populous counties comprising 43% of the population elected 43% of the senators, whereas the 1945 Senate was elected under the apportionment statutes condemned in 1962,[3] and under which less than 10% of the people could elect a majority of the Senate.

In this connection, it is also interesting to note that the pending constitution contains new and far-reaching powers relating to home rule,[4] rapid transit,[5] public parking systems,[6] and county-furnishing of municipal-type services[7]—matters all of peculiar interest to urban areas. Yet the effect of the decision below is effectively to preclude the acquisition of this much-needed authority by the great metropolitan centers for another four years. Nor is it any answer to say that these goals can still be achieved by submission of individual amendments separate as to subject matter (Constitution of 1945, Art. XIII), for the experience of the 1964 General Assembly discloses that, for example, in writing into the new constitution the new powers relating to rapid transit, substantial alterations were required in several articles, such as those relating to taxation, public debt, and eminent domain, yet the legality of piece-meal amendments touching several articles is questionable under the existing constitution.

In **League of Nebraska Municipalities v. Marsh**, 209 F. Supp. 189, 194 (D. C. Neb. 1962), the district court refused to enjoin submission of a proposed constitutional amendment reapportioning the Legislature, based upon plaintiffs' contention that the amendment itself was un-

[4] Art. 7, Ga. Laws 1964 Ex. Sess., pp. 234, 315 et seq.

[5] Art. 5, Sec. 4, Par. 2, Ga. Laws 1964 Ex. Sess., pp. 234, 304.

[6] Id.

[7] Art. 7, Sec. 1, Ga. Laws 1964 Ex. Sess., pp. 234, 315.

constitutional, the court declining to consider the validity of the amendment in advance of its submission.

And, in **Lucas v. Colorado General Assembly,** 377 U. S. 713 (1964), this court approved the action of the district court below in permitting submission of a Constitutional amendment proposed by a malapportioned legislature.

In **Reynolds v. Sims,** 377 U. S. 533 (1964), where the district court had expressed an opinion that a proposed constitutional amendment was void for failing to meet federal requirements, the district court nevertheless did not enjoin its submission to the voters. See 208 F. Supp. 431. There is another obvious difference. There the Court expressed an opinion only with respect to a single measure designed as a compliance with the Court's opinion. Here, the Court has gone outside the confines of the pending litigation to adjudicate with respect to an entirely new constitution, the apportionment provisions of which undisputedly are valid under equal protection requirements.[8]

In all six of the state reapportionment cases decided by this Court on June 15, 1964, it was expressly recognized that there would be an interim period during which a legislature determined to be malapportioned nevertheless would be permitted to continue. In **Maryland Committee v. Tawes,** 377 U. S. 656, 675 (1964), this court of its own volition approved a two-year delay in reapportionment, and in the Virginia case, **Davis v. Mann,** 377 U. S. 678, 692 (1964), a delay of approximately 1½ years was approved. Yet in none of these cases was it suggested that during this interim period, the legislatures thus constituted would be without plenary legislative power.

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[8] Article 2, Sec. 3, Par. 1 of the proposed Constitution provides that, "The House of Representatives shall consist of not less than one hundred sixty-two nor more than two hundred sixteen members and the apportionment thereof shall be as provided by the General Assembly" (Ga. Laws 1964 Ex. Sess., pp. 234, 244).

A contrary doctrine would enable a court to exercise a veto power over all state legislation, approving only that which meets the economic or political philosophy of the prevailing judicial order. Courts are not equipped to exercise such value judgments. The federal judiciary is not comprised of philosopher-kings. The danger of their undertaking to make policy-choices was forcibly stated 50 years ago in Mr. Justice Holmes' dissent in **Lochner v. New York**, 198 U. S. 45, 75 (1905).

State cases relied upon by plaintiffs, such as **McFadden v. Jordan**, 32 Cal. 2d 330, 196 P. 2d 787, 796 (1948), and **Livermore v. Waite**, 102 Cal. 113, 36 Pac. 424 (1894), are inapposite insofar as federal constitutional aspects are concerned, as those cases involved not apportionment, but failure of a state legislature to follow state procedural requirements in the manner of submission.

(b) **Reliance on State Law Considerations.**

In enjoining submission of the proposed revised constitution, the district court below relied not only upon the alleged effects of submission by a malapportioned legislature, but also upon the court's independent interpretation of state constitutional provisions governing amendment procedures to the effect that a completely new constitution could be submitted only by a constitutional convention. See Constitution, Art. XIII (Appendix B).

It is impossible to determine whether the Court would have reached the result it did absent the supposed state grounds. It therefore becomes pertinent to discover whether the district court erred in its determination of the state question, for if so, it is entirely possible that it would not have felt federal considerations alone compelling enough to justify the drastic remedy administered.

To begin with, it goes without saying that federal courts are bound by the decision of the state courts as to the

meaning and interpretation of a state constitutional provision. **American Federation of Labor v. Watson,** 327 U. S. 582, 596 (1946); **Louisiana ex rel. Francis v. Resweber,** 329 U. S. 459 (1947). So being, it is too clear to admit of argument that the identical question of state law decided by the federal court below was decided in a manner completely contrary to that of the Georgia Supreme Court. As shown in Appendix B, the provisions of the 1877 Constitution governing amendment procedures, under which the 1945 Constitution was adopted, were for all relevant purposes identical to those of the 1945 Constitution, under which the proposed constitution was being submitted. Secondly, it is likewise clear that the identical procedure of submission, drafting by a statutory constitutional commission, passage by two-thirds of both houses, and ratification by the people, was being employed. Compare Ga. Laws 1963, Vol. I, p. 402; Ga. Laws 1964, Ex. Sess., p. 234, with Ga. Laws 1943, p. 1680; Ga. Laws 1945, p. 8.

Following adoption of the 1945 Constitution, it was attacked on the identical ground asserted here, i. e., that under the existing State constitutional provisions governing amendment procedures, a completely new constitution as distinguished from individual amendments, could be submitted only by a constitutional convention. The Supreme Court of Georgia rejected this contention, holding that the provisions of the Constitution of 1877 governing constitutional conventions could not be construed as the exclusive means of overall constitutional revision. Concerning the state constitutional provision governing conventions, it was said:

> "The section purports to do nothing more than to place limitations upon the legislative branch of the government as to the manner in which a convention can be called by this branch of the government" (200 Ga at 331).

As pointed out in Saye, "Constitutional Development in Georgia Since 1945", 13 Ga. B. J. 275 (1951), not only was the federal constitution adopted by a procedure not in accord with the resolution of Congress which referred only to amending the Articles of Confederation, but also, the Georgia Convention of 1788 was called in disregard of the procedure prescribed in the Constitution of 1777.

Moreover, the identical question had already been resolved earlier this year by an opinion of the Attorney General of Georgia.

In response to a request from the Governor, the Attorney General had, on May 28, 1964, rendered an opinion upholding the procedure being followed, in which it was concluded:

> "Moreover, the language of the Supreme Court quoted above and the reasoning there employed is such as to make it clear that the same rule applies regardless of whether the question is raised before or after the proposal is ratified by the people, for the basis of the Court's opinion is not some far-fetched notion of estoppel, but rather the proposition that the provisions of the existing Constitution governing conventions do not operate as an implied exclusion of all other means, but merely as a limitation upon the convention procedure should it be invoked."
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> "There is another reason, however, why the same rule applies regardless of whether the challenge is made before or after the ratification. If the procedure of submission is illegal, the fact that a proposal is ratified by the people does not cure the illegal submission. **Seago v. Richmond County**, 218 Ga. 151; **Higer v. Hanson**, 67 Idaho 45, 170 P. 2d 411 (1946); **Stovall v. Gartrell**, ... Ky. ..., 332 S. W. 2d 256 (1960). Consequently, if the contention urged here be valid, a different result would have been compelled in the **Fargo** case, supra.

> Secondly, the argument urged against the present procedure completely overlooks the most basic and fundamental of all principles of constitutional law: a state constitution is not a delegation or grant or power, but is only a limitation of power. **11 Am. Jur 619**, Sec. 18; **16 C. J. S. 189**, Sec. 70; Cooley, **Constitution Limitations**, p. 126 (7th Ed.); **Tripp v. Martin**, 210 Ga. 284, and cf. Constitution, Art. III, Sec. VII, Par. XX (Code, Sec. 2-1920). So construed, Art. XII, Sec. I, Par. II, is merely a limitation upon the convention procedure, and does not elevate it to the status of an **exclusive method.**"

Obviously, an opinion of the Attorney General is not conclusive on the courts, but rendered as this one was outside the context of any pending litigation, it is certainly entitled to respect. **Georgia Association of Osteopathic Physicians v. Allen**, 112 F. 2d 52, 54 (C. C. A. 5th 1940).

Defendants submit that, fairly construed, the **Wheeler** decision can mean but one thing, and that is that the constitutional convention method is not the exclusive method of complete constitutional revision, whether raised before or after the ratification by the people. The Supreme Court expressly recognized that, even in the context of a challenge after ratification, the ratification must be in accord with existing legal machinery (200 Ga. at 334), yet what was done there was upheld.

Aside from the fact that the district court below was bound to follow the Wheeler case, even assuming that it considered the issue doubtful,[9] it is submitted that it should have abstained pending an authoritative determination by the state court.

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[9] In its opinion below, the court declared: ". . . We do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as in the case here, proposed under conditions of doubtful legality . . ."

Ever since the landmark decision in **Railroad Commission v. Pullman Company**, 312 U. S. 496 (1941), it has been well settled that as one manifestation of the principle that equitable jurisdiction is discretionary, the federal courts generally will abstain pending determination of proceedings to be brought in state court which may have the effect of obviating the necessity for federal adjudication. See also **Leiter Minerals, Inc. v. United States**, 352 U. S. 220 (1956); **Louisiana Power & Light Co. v. Thibodaux**, 360 U. S. 25 (1959); **Spector Motor Service, Inc. v. McLaughlin**, 323 U. S. 101, 105 (1944). Of course, the present case differs somewhat from the usual abstention-type situation, when the ultimate resolution of federal questions may be avoided by possible state court interpretation of state laws. Here the resolution of the state question would not remove the federal questions, but in view of the district court's reliance on the combined effect of both state and federal grounds, abstention has "drawn upon the judicial discretion of the chancellor to decline jurisdiction over a part or all of a case brought before him." **Louisiana Power and Light Co. v. Thibodaux**, 360 U. S. 25; 28 (1959).

The doctrine applies to civil rights cases with a racial context, **Harrison v. N. A. A. C. P.**, 360 U. S. 167 (1959), as well as to those involving apportionment. **Lucas v. The Forty-Fourth General Assembly of Colorado**, 377 U. S. 713 (1964), footnote 2; **Swanson v. Illinois**, 226 F. Supp. 699 (D. C. Ill. 1964). And, as more recently declared by this Court,

> "It is not for us, however, to decide this question of Maryland law, or to reach a conclusion as to how the Maryland Court of Appeals would decide it. Such a course would be inconsistent with our tradition of deference to state courts on questions of state law." **Bell v. Maryland**, 378 U. S. 226 (1964).

McNeese v. Board of Education, 373 U. S. 668 (1963), relied upon by plaintiffs, is obviously distinguishable, for there the court held that an **administrative remedy** need not be exhausted where it was seen that the remedy was not adequate. Secondly, the fact that proceedings were not already pending in state courts is immaterial, for such was also the case in **Railroad Commission v. Pullman Company**, 312 U. S. 496 (1941). In this connection, plaintiffs are in error in asserting that sufficient time did not remain for institution of necessary state court proceedings. Hearing on an application for temporary injunction could be set upon three or four days notice, Ga. Code Ann., § 55-201. The decision granting or denying a temporary injunction is subject to review by the Supreme Court of Georgia even though an answer has not been filed. Ga. Code Ann., § 6-903.

It is thus apparent that there was ample time for institution of state court proceedings and docketing of an appeal in the Supreme Court of Georgia for its September Term which began September 7, 1964. Ga. Code Ann., § 24-3801.

2. The Order Purporting to Limit the Authority of the 1965 General Assembly.

This injunctive order, granted without any pleadings or evidence whatever to support it, and without a single member of the General Assembly being made a party of record, in effect undertakes to tell the 1965 General Assembly what it can consider, and how long it can function, stated to be:

> ". . . [T]he enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements

and as may be necessary to permit the holding of elections to the newly constituted General Assembly. . . ."

It is difficult if not impossible to determine fully the extent of this order, and its scope can not be fully appreciated except as specific problems may arise in the future. Since, strictly speaking the proposing of constitutional amendments is not "legislation," **11 Am. Jur. 632**, § 28, it seems doubtful that the 1965 General Assembly could propose constitutional amendments, unless paragraph 2 of the order be construed as so authorizing.

In addition to the enactment of legislation, the General Assembly otherwise has authority to vote bills of impeachment,[10] conduct investigations, election contests,[11] elect and remove a state auditor,[12] and grant pardons or other relief for persons convicted of treason.[13] Yet if the injunctive order here complained of be valid, none of these functions can be performed.

Plaintiffs assert, however, that the district court's order was not intended to have the effect claimed by defendants. But as shown in the various statements made by members of the court below on the June 19th hearing, it is clear beyond cavil that the court below intended for it to have exactly that effect, and the only reason why the 1965 General Assembly was not limited solely to reapportionment legislation was recognition of the fact that the Georgia Constitution[14] requires that a new appropriations act

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[10] Constitution of Georgia, Art. III, Sec. VI, Par. III (Code Ann., § 2-1803).

[11] Id., Sec. VII, Par. I; and see Beatty v. Myrick, 218 Ga. 629, 129 S. E. 2d 764 (1963).

[12] Ga. Code Ann., § 40-1801.

[13] Constitution of Georgia, Art. V, Sec. I, Par. XI (Code Ann. § 2-3011).

[14] Constitution, Art. VII, Sec. IX, as amended (Code Ann., § 2-6202).

be enacted in 1965 (Tr. 70, 85). Moreover, the fact that plaintiffs are willing to agree to modification of the order in this regard (Motion to Affirm, p. 20) is unavailing, for not only did they not seek the relief at issue, but expressly disclaimed it in two instances (Tr. 43, 94). As pointed out previously, defendants have recently filed a motion with the district court seeking modification of the order in this respect, but to date a hearing thereon has not been set.

In addition to imposing limitations as to the **subject matters** which the House (and consequently, in most cases, the Senate as well) may consider, the decree also undertakes to limit the **period** during which the House can function. While the decree contemplates that a reapportioned House need not necessarily take office until 1966, thereby requiring special elections in 1965, the plain intendment of the language of the decree is to prohibit the House from functioning at all after the regular 45-day session adjourns in early 1965.[15] This would preclude the convening of any special sessions of the General Assembly should the occasion arise, the appointment or functioning of any interim committees, and would even render illegal the expenditures of state funds to maintain the offices of the Speaker, Floor Leader and other officials. After adjournment of the 45-day session which convenes in January, state government would become paralyzed, and incapable of dealing with any emergency that might require immediate attention.

For the same reasons urged with respect to so much of the order as enjoined submission of the proposed new constitution, it is submitted that this part of the order is similarly erroneous. Both are predicated upon the assumption that because the Court can decree reapportionment, it can likewise supervise all phases of the internal affairs of the legislature pending compliance.

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[15] Constitution of Georgia, Art. III, Sec. IV, Par. III (Code Ann., § 2-1603, Supp.).

This, we submit, is not within the scope of relief contemplated by this Court's decisions of June 15th.

Nor is this any situation as was involved in **Thigpen v. Myers**, 231 F. Supp. 928 (D. C. Wash. 1964), where a recalcitrant legislature had failed to act for a period of two years following decisions of the court (211 F. Supp. 826), and a frustrated federal court felt the need for drastic prodding action. When the court below held that one house was required to be reapportioned, **Toombs v. Fortson**, 205 F. Supp. 248 (D. C. Ga. 1962), it was accomplished within six months (Ga. Laws 1962, 2nd Ex. Sess., pp. 7, 15). When this Court decided on February 17, 1964, that Georgia congressional districts were required to be rearranged, **Wesberry v. Sanders**, 376 U. S. 1 (1964), the necessary legislation was signed into law less than one month later (Ga. Laws 1964, Vol. I, p. 478). In view of such performance, it is hardly charitable to assume in advance that the members of the Georgia General Assembly will so suddenly become errant knaves.

CONCLUSION.

The judgment below should be reversed.

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APPENDIX "A".

Constitutional and Statutory Provisions Governing Apportionment of Members of the House of Representatives of the General Assembly of Georgia.

Georgia Constitution of 1945, Article III, Sec. III:

Paragraph I.—**Number of representatives.**—The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

Paragraph II.—**Apportionment changed, how.**—The above apportionment shall be changed by the General Assembly at its first session after each census taken by the United States Government in accordance with the provisions of Paragraph I of Section III of this Article.

Georgia Code Ann.:

47-101.—**House of Representatives; membership apportioned.**—The membership of the House of Representatives shall be as follows: Three members each from the counties of Fulton, DeKalb, Chatham, Muscogee, Bibb, Richmond, Cobb, Dougherty; two members each from the counties of Floyd, Hall, Lowndes, Troup, Clayton, Clarke, Walker, Gwinnett, Whitfield, Glynn, Houston, Carroll, Spalding, Thomas, Ware, Baldwin, Colquitt, Laurens, Coweta, Bartow, Coffee, Polk, Decatur, Sumter, Bulloch, Upson, Tift, Cherokee, Catoosa, Newton; and one member each from each of the other counties of the State.

APPENDIX "B".

Constitutional Provisions Governing Amendment and Revision of the State Constitution.

I.

Constitution of 1877, Art. XIII, Sec. I.

Paragraph I.—**Proposal by General Assembly submission to people.** Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon. And the General Assembly shall cause such amendment or amendments to be published in one or more newspapers in each Congressional District, for two months previous to the time of holding the next general election and shall also provide for a submission of such proposed amendment or amendments, to the people at said next general election, and if the people shall ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of this Constitution. When more than one amendment is submitted at the same time they shall be so submitted as to enable the electors to vote on each amendment separately.

Paragraph II.—**Convention, how called.** No Convention of the people shall be called by the General Assembly to revise, amend or change this Constitution, unless by the concurrence of two-thirds of all the members of each House of the General Assembly. The representation in

said convention shall be based on population as near as practicable.

Note: The Georgia Constitution was adopted under the 1877 Constitution by a procedure set forth and held legal in **Wheeler v. Board of Trustees of Fargo Consolidated School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946). The identical procedure is being employed with respect to the proposed new state constitution, enjoined by the district court below.

II.

Constitution of 1945, Art. XIII, Sec. I.

Paragraph I.—**Proposal by General Assembly; submission to people.** Any amendment to this Constitution may be proposed by a resolution in the Senate or the House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each branch of the General Assembly, such proposed amendment shall be entered on the journals of each branch with the Ayes and Nays taken thereon. Any proposed amendment may be repealed or amended by the same General Assembly, if done so at least two months prior to the date of the election at which such proposed amendment is to be submitted.

The Governer, the Attorney General, and the Secretary of State shall meet and determine whether a proposed amendment is general, and if not general, shall determine what political subdivision or subdivisions are directly affected by such proposed amendment. If a proposed amendment is general, the Governor shall cause such proposed amendment to be published in full once each week for three consecutive weeks immediately preceding the date of the election at which such proposed amendment is submitted, in one newspaper of general circulation in

each Congressional district of the State. If such proposed amendment is not general, the Governor shall cause such proposed amendment to be published in full in one newspaper of general circulation in each county in which the directly affected political subdivision or subdivisions are located. In the event no such newspaper is located in such county, a newspaper in an adjoining county shall be used.

Any proposed amendment which in general shall be submitted to the people of the entire State at the next general election at which members of the General Assembly are elected, and if ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon, such amendment shall become a part of this Constitution. A proposed amendment which is not general shall only be submitted to the people of the political subdivision or subdivisions directly affected. The votes of the electors in each political subdivision affected shall be counted separately in determining whether such proposed amendment is ratified, and it must be ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon in each such political subdivision before it shall become a part of this Constitution. The General Assembly, in the resolution, shall state the language to be used in submitting the proposed amendment.

When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately.

Paragraph II—**Convention, how called.** No convention of the people shall be called by the General Assembly to revise, amend or change this Constitution, unless by the concurrence of two-thirds of all members of each house of the General Assembly. The representation in said convention shall be based on population as near as

practicable. This Constitution shall not be revised, amended, or changed by the Convention until the proposed revision, amendment, or change has been submitted and ratified by the people in the manner provided for submission and ratification of amendments proposed by the General Assembly.

Paragraph III—**Veto not permitted.** The Governor shall not have the right to veto any proposal by the General Assembly to amend the Constitution.